No. 22,572 and 22,572A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

RAYTHEON COMPANY, *Respondent*

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

AND

RAYTHEON COMPANY, *Intervenor*

On Petition for Enforcement and on Petition to Review an Order of the National Labor Relations Board

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BRIEF FOR RAYTHEON COMPANY

ALFRED C. PHILLIPS

PAUL B. ASCHER
141 Spring Street
Lexington, Massachusetts 02173
Attorneys for Raytheon Company

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STATEMENT OF THE CASE

Preliminary Statement

I. Basis for this Court's Jurisdiction.

These cases, consolidated by order of the Court, arise from an unfair labor practice proceeding initiated before the National Labor Relations Board[1] by the International Union of Electrical, Radio and Machine Workers, AFL-CIO[2] against Raytheon Company[3]. Case No. 22,572 is the Board's petition for enforcement of its order en-

[1] Referred to herein as the "Board".

[2] Referred to herein as the "IUE".

[3] Referred to herein as "Raytheon".

tered against Raytheon in said unfair labor practice proceeding. Case No. 22,572A is the IUE's petition for review of that portion of the Board's order which refused to grant a motion made at the hearing by the IUE to amend the complaint to allege further unfair labor practices. This Court has jurisdiction of the cases under Sections 10(e) and 10(f) of the National Labor Relations Act[4], as amended, respectively, the conduct in question having occurred in California.

2. The Board's Petition for Enforcement.

This brief on behalf of Raytheon will be directed primarily to the Board's petition for enforcement of its order. Said order is based upon findings and recommendations of the Trial Examiner, adopted by the Board, to the effect that certain portions of a speech given by Raytheon's Vice-President Robert G. Hennemuth to eight separate groups of production and maintenance employees at Raytheon's Mountain View, California plant prior to a representation election conducted by the Board[5] and certain statements made by one of Raytheon's first level foremen (Nicola Krest) to one (Carolyn Alvarado) of the 557 employees eligible to vote constituted violations of Section 8(a)(1) of the Act.

In view of the Trial Examiner's findings that Krest's remarks to Alvarado "took on added emphasis and significance" from the Hennemuth speeches (R. 20, lines 28-31)[6] and that Raytheon's violation of Section 8(a)(1) was in "major part" through said speeches, (R. 23, line 37), the question as to whether the speeches were lawful

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[4] Referred to herein as the "Act".

[5] Referred to herein as "the Hennemuth speeches".

[6] References herein to the pleadings filed with the Court as Volume I, Pleadings will be designated "R.". References to the stenographic transcript of the Hearing before the Trial Examiner filed with the Court as Volumes II and III, will be designated "Tr.". References to Exhibits of the General Counsel, Petitioner (IUE), and Respondent will be designated G.C. Exh., Pet. Exh., and Resp. Exh. respectively.

is of primary importance in determining whether the Board's order is entitled to enforcement.

In this brief Raytheon will set forth argument and precedent in support of its position as follows:

1) The Hennemuth speeches were a moderate and reasoned presentation of facts the employees were entitled to consider prior to the election and were a proper exercise of the right of free speech guaranteed by Section 8(c) of the Act and the First Amendment to the U. S. Constitution; and

2) With respect to the Krest-Alvarado incident, no proper credibility findings were made to resolve the conflict in testimony between Krest and Alvarado; even if the testimony of Alvarado is accepted as correct, Krest's alleged statements were lawful and protected by Section 8(c) and the First Amendment; and, in any event, the incident does not reflect a general plan of coercion by Raytheon, and is *de minimis*.

3. The IUE's Petition for Review.

With respect to the IUE's petition for review, it is the position of Raytheon that the Board properly refused the request to amend the complaint at the hearing. As all parties to unfair labor practice proceedings before the Board are fully aware, evidence as to specific violations must first be presented to the General Counsel who, acting in this instance through the Regional Director, determines whether the evidence warrants issuance of a complaint.

Here the complaint as issued was limited to certain specified allegations. It was improper for the IUE to attempt at the hearing to introduce evidence with respect to allegations not specifically set forth in the complaint; it can be presumed that the Regional Director had concluded that there was insufficient evidence to warrant a hearing with respect to said allegations. Since this issue directly relates to the functions of the Board under the

Act and has been thoroughly argued by the Board in its brief, Raytheon will not present additional argument on the issue in this brief.

STATEMENT OF FACTS

Raytheon is an electronics manufacturer with plants located in several states (Tr. p. 236). As of the date of the hearing Raytheon employees in Massachusetts, Connecticut, Rhode Island, and Oxnard and South San Francisco, California were represented by unions and there had never been a strike by Raytheon employees (Tr. p. 236). Approximately nineteen petitions for elections have been filed at Raytheon plants during the period 1960-1966 and prior to the instant case no objections had been filed to Raytheon's pre-election conduct. (Tr. pp. 237-238).

On January 4, 1965, the IUE filed a petition with the Board for a representation election to be held in a unit of production and maintenance employees at Raytheon's Mountain View, California plant. Subsequently the IBEW expressed an interest in the proceeding and the February 4 election date was agreed upon by the parties. The final tally of votes was: Neither Union 301, IUE 161, IBEW 54. (R. 19, lines 31-36).

On February 11, 1965, the IUE filed objections to Raytheon's pre-election conduct, and on April 5, 1965, filed the unfair labor practice charge which is the subject of this proceeding. (R. 19, lines 36-38). The objections to the election and the unfair labor practice proceeding were consolidated by order of the Regional Director and a hearing was held on January 19 and 20, 1966, in San Francisco before Trial Examiner William E. Spencer. (R. 12, 18).

On June 13, 1966, the Trial Examiner issued a decision in which he recommended that the election be set aside and that Raytheon be found to have violated Section 8(a)(1) on the basis of Hennemuth's speeches and the

statements made by Krest to Alvarado and be ordered to cease and desist from committing further unfair labor practices of a similar nature. (R. 18-27). In a Decision, Order and Direction of Second Election issued on October 5, 1965, the Board adopted the findings of the Trial Examiner, except that in a footnote comment, the Board found, contrary to the Trial Examiner that statements by Hennemuth that it was his job to investigate any complaints brought to his attention by any employee at any of Raytheon's facilities constituted the "announcement of a new grievance procedure" and consequently was a further violation of Section 8(a)(1). (R. 41-44).

Although the Board, on page 8 of its Brief, refers to the fact that "the Company relied heavily on an extensive anti-union propaganda campaign", the evidence submitted was several bulletins, two newspaper clippings relating to IUE strikes and the Hennemuth speeches. (G.C. Exh. 4-12). On the other hand, the IUE distributed approximately 20 to 25 leaflets during the six and a half month organizing drive and held regular meetings at a local motel. (Tr. p. 219, lines 9-11; p. 213, lines 14-20; p. 217, lines 11-15; Pet. Exh. 3).

Although in the Statement on pages 2-7 of its brief, the Board refers to three of the Raytheon bulletins, the complaint did not allege any violations based on said bulletins and the validity of the bulletins was not litigated before the Trial Examiner or the Board.

In commenting on the Hennemuth speeches, the Trial Examiner noted that they were given without rancor "and in an atmosphere which was undoubtedly calculated to and did in fact convey the appearance of friendly counsel." (R. 20, lines 38-44). Seven of the eight sessions of the speech were recorded by tape. (Tr. p. 244)[7]. In the second, third and fourth sessions, through inadver-

[7] The session with a group of 15 to 17 deaf mutes was not recorded as it was very slow. (Tr. p. 244)

tence the recording machine was not turned on until several minutes had elapsed. (Tr. pp. 245-246). The Trial Examiner found that the testimony of the General Counsel's witnesses with respect to the content of the speeches was not markedly at variance with the tape recording. (R. 20, lines 52-54). One General Counsel witness testified that the speech she heard "was almost completely a letter that we received a day after the speech." (Tr. 93, lines 9-10; G.C. Exh. 11).

The Statement in the Board's brief sets forth only selected excerpts from the Hennemuth speeches. In the prepared portion of the speeches, Hennemuth introduced himself, summarized his background with Raytheon, and gave the employees the following four thoughts (G.C. Exh. 11):

> 1) *Importance of voting* — The voting procedure with emphasis on each employee's right to make his own decision by a secret ballot; if a majority of the employees actually voting selected a union then that union would represent the entire unit even though many employees may not have expressed their right to vote. (Speech 1—Resp. Exh. 3 pp. 2-4; Speech 2—not recorded; Speech 3—not recorded; Speech 4—not recorded; Speech 5—Resp. Exh. 7, pp. 2-3; Speech 6—Resp. Exh. 8, pp. 2-3; Speech 7—Resp. Exh. 9, pp. 2-3)
>
> 2) *Explanation of the collective bargaining process* — The necessity for agreement by both parties to any contract terms with emphasis on the fact that the union could not guarantee anything since a period of negotiations must follow and that if the Company did not agree to union demands, the union's only remedy is to strike. (Speech 1—Resp. Exh. 3, pp. 4-5; Speech 2, not recorded; Speech 3—Resp. Exh. 5, p. 1; Speech 4—Resp. Exh. 6, p. 1; Speech 5—Resp. Exh. 7, pp. 3-4; Speech 6—Resp. Exh. 8, pp. 3-6; Speech 7—Resp. Exh. 9, pp. 3-5).
>
> 3) *Comparison of wages and fringe benefits* — Review of existing wage rates, fringe benefits and working conditions, emphasizing that fringe benefits are uniform at Raytheon plants, union or non-union, and

that present wages, fringe benefits and working conditions at the Mountain View plant have been obtained without a union. (Speech 1—Resp. Exh. 3, pp. 5-8; Speech 2—Resp. Exh. 4, pp. 1-2; Speech 3—Resp. Exh. 5, pp. 1-4; Speech 4—Resp. Exh. 6, pp. 2-6; Speech 5—Resp. Exh. 7, pp. 5-8; Speech 6—Resp. Exh. 8, pp. 6-9; Speech 7—Resp. Exh. 9, pp. 5-8).

4) *Request for support*—Raytheon's expenditure of million of dollars on the Mountain View plant without receiving any profit; the pledge of continuing support by Raytheon; and the request for employee support. Speech 1— Resp. Exh. 3, pp. 8-9; Speech 2—Resp. Exh. 4, pp. 2-3; Speech 3—Resp. Exh. 5, pp. 4-5; Speech 4—Resp. Exh. 6, pp. 6-7; Speech 5—Resp. Exh. 7, pp. 8-9; Speech 6—Resp. Exh. 8, pp. 9-10; Speech 7—Resp. Exh. 7, pp. 8-9).

The vast majority of the statements made in the presentation of these thoughts and in the responses to questions from employees has not been challenged by the Board.

Throughout both the prepared portion of the speeches and his responses to the questions, Hennemuth repeatedly made comments such as the following which clearly advised the employees that the final decision was entirely up to them and that Raytheon could not and *would not* make threats or promises to influence that decision:

"And we recognize that this election, which is going to be held Thursday, is strictly your business but we do feel obligated as the management of the company to make sure that you have the facts that are involved as we see them and then you make your own choice and vote whichever way you please and I promise you on behalf of the company, first of all we won't know how you vote, but even if we did there will be absolutely no recrimination of any kind. This is a free election in the good old American tradition and we heartily approve of the whole idea. It is the best way I know of to settle any kind of a matter that is a public issue, if you will." (Resp. Exh. 3, p. 1, lines 21-30).

"Look, let me say this to you folks. Rules or not, in this election so far as we're concerned in manage-

ment, we don't want to do ill to any of you people at any time and we don't want to be unfair or unreasonable. We respect your right to make whatever decision you're going to make on Thursday and all I can say to you really — and maybe this will answer your question — we are going to deal with our employees in good faith no matter whether a union is present or not. So our concern is with our employees and not with any union." (Resp. Exh. 5—p. 13, lines 12-19).

"Incidentally, while I'm saying that though, let me make sure you understand the rule. We would not do it any differently anyway but the Federal rules are very clear on this — your employer may not promise you any benefits in order to get you to vote one way or another in this kind of a contest, nor may your employer make any threat of a reprisal for voting a certain way. We won't know how any one of you voted anyway so don't worry about it. But this is not the way we believe in doing business in any event, so I want to make sure you understand in case I may not always be clear in what I say. So if some of you think that there is an implication that I'm promising something to you or threatening you in some way that is not my intention in anything I have to say today." (Resp. Exh. 6—p. 2, lines 3-15).

"It is contrary to the laws of the United States for me to offer you anything by way of an economic improvement for you to vote one way or the other or for me to threaten you with any kind of reprisal, in case you do vote a union in. So, please, don't misunderstand anything I am going to say today. I recognize the rules and I intend to abide by them in whatever comments I'm making right now." (Resp. Exh. 7—p. 2, lines 17-23).

. . . "[O]ne of the rules that has been very firmly established by Federal law here is that in a situation of this sort the employer may not offer any kind of economic inducement to the employees to try to persuade them how to vote. Neither may an employer threaten any form of reprisal in case they vote the wrong way. So, I have to be extremely careful in anything I'm saying to you today. Not even to imply

that we're promising you anything — we're not." (Resp. Exh. 8—p. 11, lines 1-8).

For similar statements, see Resp. Exh. 3, p. 4, lines 5-7; Resp. Exh. 4, p. 3, lines 10-11; Resp. Exh. 5, p. 5, lines 29-31, p. 12, lines 28-29; Resp. Exh. 6, p. 9, lines 2-9, 26-32, p. 10, lines 1-4; Resp. Exh. 7, p. 1, lines 20-26, p. 3, lines 4-18, p. 13, lines 7-15; Resp. Exh. 8, p. 2, lines 31-32, p. 3, lines 1-3, 17-27, p. 16, lines 1-3; Resp. Exh. 9, p. 1, lines 5-10, p. 3, lines 1-13, p. 9, lines 9-22.

The non-coercive effect of the speeches is revealed both from a review of the transcriptions in their entirety and from listening to the tapes, which were received in evidence for all purposes. (Tr. p. 263). The amicable tone of the speeches and the audience response, in terms of laughter and persistence in asking questions if unsatisfied with the first answer, demonstrate that the atmosphere was not one of fear and coercion.

Avoiding references to the foregoing statements and without reviewing the total effect of the speeches, the Board by use of conclusory generalizations and quoted excerpts taken out of their proper context attempted to convey the impression that the speeches contained threats of reprisal. For example, the excerpt on pages 4-5, taken from page 14 of the sixth speech (Resp. Exh. 8) — "[N]egotiations [don't] start from where the benefits are . . . you start from scratch" — was taken wholly out of the context in which it was made, which was as follows:[8]

"And as has been mentioned now, in some of the fliers and material I have seen, the union people would have you believe that when a negotiation starts in a situation like that, that you start from where the benefits are. It ain't so. You start from scratch. In negotiating." (Resp. Exh. 8, p. 14, lines 28-32).

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[8] See also quote commencing on last line of p. 5 of the Boards' brief, which omits Hennemuth's qualification — "legally if I may in this sense." (R. 21, line 49; Resp. Exh. 3, p. 4, line 16).

On page 6 of its brief the Board refers to Hennemuth's answer to employee sick-leave questions. In quoting excerpts of Hennemuth's predictions with respect to sick leave the Board omits those portions of Hennemuth's responses which explain in detail the economic reasons why sick leave could not be granted. The sick leave issue first arose during the questioning following the speech to the first group of employees when in response to a question, Hennemuth stated the following:

> "Wait a minute. So don't feel that just because you vote a union here you're going to get paid sick leave. Because, I'd like to tell you, this is one thing we're firm about and the only reason why, it's strictly cost. Our last estimate in reference to this was it was going to cost us two million dollars to put in the kind of paid sick leave program around the country that we'd like to put in because we don't believe on fringe benefits in discriminating one plant against the other." (Resp. Exh. 3, p. 15, lines 22-29).

In the speeches to the second, fourth, fifth, and seventh groups, Hennemuth made similar predictions with respect to sick leave and in each case explained the economic justification for Raytheon's position. (Resp. Exh. 4, p. 9, lines 23-31; Resp. Exh. 6, p. 3, lines 16-31; Resp. Exh. 7, p. 5, line 27, p. 6, line 22; Resp. Exh. 9, p. 6, line 13- p. 7, line 9). The transcriptions of the speeches to the third and sixth groups do not reveal any predictions with respect to sick leave. (See Resp. Exhs. 5 and 8).

The Board also states on page 6 of the brief that Hennemuth "announced the institution of a new grievance procedure." Such a statement is an elaborate expansion of the actual remarks made by Hennemuth on this subject. The matter initially was not part of the prepared speech. In response to a question from the first group relating to the integrity of the grievance procedure, Hennemuth stated that it was the responsibility of his

office to receive and to investigate any claims of "inequity" by Raytheon employees. (Resp. Exh. 3, p. 11, lines 26-34).

Similar statements were made to the second, third, fourth and sixth groups, Hennemuth noting in each instance that his office was charged with investigating complaints from human beings anywhere in the company. (Resp. Exh. 4, p. 3, line 30- p. 4, line 1; Resp. Exh. 5, p. 9, lines 12-14; Resp. Exh. 6, p. 5, lines 29-32; Resp. Exh. 8, p. 12, lines 20-24.) In mentioning this subject to the fourth group, Hennemuth stated as follows:

> "One other thing that you may not know that you should know because its been established for a long time, my office has been charged with the responsibility of curing inequities that involve human beings anywhere in the company." (Resp. Exh. 6, p. 5, lines 29-32).

The transcriptions of the speeches made to the fifth and seventh groups do not reveal any reference was made to the responsibility of Hennemuth's office to investigate employee complaints. (See Resp. Exhs. 7 and 9).

The only other issue before the Court in addition to the challenge to the Hennemuth speeches is whether Raytheon violated Section 8(a)(1) by statements of Supervisor Krest to employee Alvarado, an outspoken union adherent, who had worn a union badge for more than two months prior to the election. (Tr. p. 24). The conflicting testimony of Krest and Alvarado and findings of the Trial Examiner will be reviewed in the Argument, herein. The Board's complaint did not allege that any other Raytheon supervisor or management representative had engaged in coercive interrogation or conduct. (R. 6-9).

Questions Presented

1. Did the Hennemuth speeches contain threats of reprisal or force or promise of benefit within the meaning of Section 8(c) of the Act so as to remove the speeches from the protection of that section and the First Amendment to the Constitution of the United States?

2. Were the statements of Supervisor Krest to Employee Alvarado of such a serious nature with sufficient impact on employees in the unit to require a finding of a violation of Section 8(a)(1) and an issuance of a cease and desist order on the basis of said statements alone without regard to the validity of the Hennemuth speeches?

ARGUMENT

THE FINDINGS OF THE TRIAL EXAMINER AND THE BOARD THAT RAYTHEON VIOLATED SECTION 8(a)(1) ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND ARE INCORRECT AND ERRONEOUS AS A MATTER OF LAW.

A. The Findings of the Trial Examiner and the Board that the Hennemuth Speeches were not Protected by Section 8(c) of the Act and the First Amendment to the Constitution are not Supported by Substantial Evidence in the Record and are Incorrect and Erroneous as a Matter of Law.

As noted in the Statement, it is Raytheon's position that the statements in the Hennemuth speeches found by the Trial Examiner and the Board to have violated Section 8(a)(1) are protected by Section 8(c) of the Act and the First Amendment to the Constitution. Section 8(c) provides as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

This Court has recognized that Section 8(c) is a limitation on the Board's authority to issue orders directed to employer speech. *NLRB* v. *TRW-Semiconductors, Inc.*, 385 F 2d 753 (CA 9, 1967); *Salinas Valley Broadcasting Corporation* v. *NLRB*, 334 F 2d 604 (CA 9, 1964).

It is submitted that the standard of review which should be applied by this Court is whether the Board's determination that the statements were not protected by Section 8(c) is incorrect as a matter of law. In view

of the nature of the issue, the Board's suggestion on page 9 of its brief that the "function of drawing the rather nebulous line between permissible persuasion and prohibited coercive conduct lies within the special competence of the Board" should not be adopted.

It is well established that the Board's findings on questions of fact must be based on substantial evidence on the record considered as a whole. 5 USC 1009(e); 29 USC 160(e); *Universal Camera Corporation v. NLRB,* 340 US 474 (1951); *NLRB v. Pittsburgh S. S. Co.,* 340 US 498 (1951). "All relevant questions of law" are to be decided by the reviewing court. 5 USC 1009(e).

It is submitted that the application of Section 8(c) to the Hennemuth speeches is a question of law which must be decided by this Court. In an excellent analysis in 4 K. Davis, *Administrative Law Treatise,* (1958) ch. 30, the commentator reviews the bases for distinguishing between questions of fact (with respect to which the administrative agency's findings are entitled to enforcement if supported by substantial evidence), and questions of law (with respect to which the court must decide whether the agency's findings are correct). The question as to whether speech is protected by statute and the Constitution would appear to be clearly a question of law but Davis submits that to avoid meaningless semantical argument, the application of the "substantial evidence" or "correctness" tests should be based on factors such as: the comparative competency of the court and the agency to determine the issue in question, and the extent to which Congress limited the agency's power with respect to the issue.

Viewed in the light of these factors, the application of Section 8(c) to the Hennemuth speeches is a question to be decided by this Court. The scope of statutory and Constitutional guarantees of free speech is an issue which this Court is at least as well qualified to decide as

the Board, an agency composed in part of non-lawyers and limited in expertise to the field of labor-management relations. The exercise of this expertise, while entitled to considerable weight with respect to such matters as the composition of appropriate bargaining units, must be more closely reviewed when it directly relates to protection of statutory and Constitutional guarantees of free speech, a province traditionally reserved for the courts.

Moreover, as noted above, Section 8(c) was specifically included in the Act for the purpose of preventing the Board from ignoring such guarantees. Consequently, such Congressional purpose would be frustrated if the Board were permitted to determine at will the scope of a limitation on its own power.

In any event, regardless of whether the application of Section 8(c) to the Hennemuth speeches is considered a question of fact or a question of law, enforcement of this portion of the Board's order must be denied since its findings with respect to the Hennemuth speeches cannot be sustained under either the "substantial evidence" or "correctness" standards. *Automation and Measurement Division, The Bendix Corporation v. NLRB,* _____ F 2d ____, 69 LRRM 2157 (CA 6, August 30, 1968); *NLRB v. Golub Corporation,* 388 F 2d 921 (CA 2, 1967); *NLRB v. TRW-Semiconductors, Inc.,* 385 F 2d 753 (CA 9, 1967).

The courts have recognized that findings by the Board of Section 8(a)(1) violations solely on the basis of writings and speech must be carefully reviewed to determine whether the Board's decision is consistent with Section 8(c) and the First Amendment. *NLRB v. Golub Corporation, supra*; see also *NLRB v. Exchange Parts Company* 375 US 405, 409 fn. 3 (1964).

The general purpose of Section 8(c) was expressed by the Supreme Court in *Linn v. United Plant Guard Workers of America, Local 114,* 383 US 53 (1966), as follows:

> "We acknowledge that the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered "against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times v. Sullivan*, 376 U.S. 254 270 (1964). Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." (383 US at 62, 63).

This Court cited the foregoing passage from the *Linn* case with approval in *NLRB v. TRW-Semiconductors, Inc.*, 385 F 2d 753 (CA 9, 1967) and then stated:

> "As the court said in Southwire Co., supra,—— F.2d at——, 65 LRRM 3042:
>
> "The guaranty of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available. It is an adversary proceeding and hardly impartial. . . .
>
> The mere fact that campaign propaganda may induce fear — and be intended to produce fear — does not deprive it of the protection of section 8(c). That is often the nature of campaign propaganda."

In *NLRB v. J. Weingarten, Inc.*, 339 F 2d 498 (CA 5, 1964), the Fifth Circuit stated that the test in determining whether statements of an employer are entitled to the protection of 8(c) is as follows:

> "whether, in the whole context in which the remark was made, it was reasonably subject to the construction by the listener that a union victory meant that the employer would *intentionally institute economic reprisals.*" (339 F 2d at 501) (emphasis supplied).

In finding that certain portions of the Hennemuth speeches violated Section 8(a)(1), the Trial Examiner and the Board have adopted a narrow mechanical approach, blindly imputing unrealistic interpretations as to meaning and impact of Hennemuth's moderate and reasoned presentation of facts which the employees could properly consider prior to the election. The Trial Examiner summarized his "concluding findings" that Hennemuth speeches violated Section 8(a)(1) as follows:

> "In sum, for all their carefully contrived appearance of amiability, the Hennemuth speeches were larded with statements which amount to an anticipatory refusal to bargain and as such were poorly concealed threats to deprive Respondent's employees of any and all benefits to be derived from the exercise of the right to collective bargaining through representatives of their own choosing." (R. 23, lines 23-29).

This finding is not only wholly unsupported by the evidence in the record but is phrased so ambiguously that serious doubt is raised as to whether the Trial Examiner actually found that the speeches contained statements which constituted intentional threats of economic reprisal within the meaning of Section 8(c). Although in its brief the Board attempted to imply that the Hennemuth statements reflected a retaliatory intent, regardless of economic circumstances, the Record is devoid of support for such an inference.

Ignoring the following: 1) Hennemuth's specific statements set forth in the Statement, to the effect that the decision as to union representation was entirely up to the employees and that Raytheon could not and would not make threats or promises to influence that decision, 2) Raytheon's bargaining relationships at other plants, evincing a lack of anti-union animus, and 3) the total context in which the remarks were made, the Trial Examiner and the Board based their finding of violation of Section

8(a)(1) upon selected statements made in connection with Hennemuth's explanation of the realities of collective bargaining.

In explaining the collective bargaining process, Hennemuth stated that a union could not guarantee anything, that the Company must agree before union proposals can be placed in effect, and if the Company does not agree the union's only recourse is to strike. (R. 21; Tr. pp. 31-32; Resp. Exh. 3, p. 4; Resp. Exh. 5, p. 1; Resp. Exh. 7 p. 3; Resp. Exh. 8, p. 4; Resp. Exh. 9, p. 3). Such an explanation is merely a restatement of one of the basic principles of the law of collective bargaining — each party must agree to wages, benefits and other terms of a collective bargaining contract.

This Court has recently approved comparable statements directed to advising employees as to the realities of collective bargaining. *NLRB v. TRW-Semiconductors, Inc.*, 385 F 2d 753 (CA 9, 1967); *Don The Beachcomber v. NLRB*, 390 F 2d 344 (CA 9, 1968); *NLRB v. Sonora Sundry Sales, Inc.* _____ F 2d _____, 68 LRRM 3000 (CA 9, August 2, 1968).

The following explanation of collective bargaining held by the Court to be legitimate in *NLRB* v. *TRW-Semiconductor, supra*, is almost identical in practical effect to the one given by Hennemuth.

> "The union can promise anything, but can it deliver? In fact, it may not be able to keep all the things the employees already have. No one can assume that if an outside union gets into our company that all the fine things we now enjoy will automatically be continued. If TRWS should be forced into negotiation with the union, the company would have to begin from scratch and bargain hard to protect our competitive position."

Recognizing the well founded impediment to its position presented by *NLRB v. TRW-Semiconductor, supra,* the Board on page 15 of its brief attempts to distinguish

the case on the ground that, "here the Company never offered an economic justification for its asserted bargaining policy." To the contrary, both the testimony of the General Counsel's witnesses and the tape transactions demonstrate that the Hennemuth speeches were replete with references to the Company's economic position and the fact that this position would have to be considered by the Company in making decisions with respect to wages and fringe benefits. (Tr. p. 34, line 23 — p. 35, line 8; Tr. p. 79, lines 17-22; Tr. p. 108, line 23 — p. 109, line 4; Tr. p. 131, lines 17-21; Tr. p. 143, 14-19; Tr. p. 170, line 23 — p. 171, line 4; Resp. Exh. 3, pp. 8-9, 15, 16, 17; Resp. Exh. 4, pp. 2-3, 9; Resp. Exh. 5, pp. 4-5; Resp. Exh. 6, pp. 6-7, 12; Resp. Exh. 7, pp. 6, 8-9, 12; Resp. Exh. 8, pp. 9-10; Resp. Exh. 9, pp. 6-7, 8-9).

The Sixth Circuit's recent decision in *Automation and Measurement Division, The Bendix Corporation v. NLRB,* _____F 2d_____, 69 LRRM 2157 (CA 6, August 30, 1968) is also directly in point. In that case the validity of two Board elections, the first won by the employer and second won by the union, was in question as the Board was seeking to enforce a refusal to bargain order against the employer. The first election was set aside on the basis of an employer's letter which stated that bargaining was a "two-way street", that wages and benefit programs "would be altered *upward or downward, created or eliminated,* as a result of this bargaining", and that bargaining "would have to begin from the *zero point,* item by item!" The union responded by implying that the U. S. Government and NLRB guaranteed that employees would lose no benefits except those they wished to change. In holding that the statements in the employer's letter were not coercive and that the first election won by the employer should have been found valid, the court noted as follows:

> "The right of free speech guaranteed by Section 8(c) of the Act applies to employers and labor

> unions alike. There is no basis for adopting a narrow restrictive rule for one party and a liberal one for the other." (69 LRRM at 2160).

In the instant case, the IUE had conducted a vigorous campaign, distributing 20 to 25 leaflets to the employees over the course of the organizing effort; and Hennemuth's statements were directed specifically to claims in the union leaflets that Federal law required bargaining to start at the present level of benefits. (Tr. p. 219; Resp. Exh. 6, p. 9, lines 22-25; Resp. Exh. 8, p. 14, lines 28-32). As noted in the Statement, the Board not only failed to consider the effect of the IUE's claims that bargaining would start at the present level, but intentionally omitted reference to such claims in quoting an excerpt from the Hennemuth speeches.

In *NLRB* v. *Herman Wilson Lumber Co.,* 355 F 2d 426 (CA 8, 1966), the court found the following explanation of collective bargaining to be within the protection of Section 8(c):

> "Herman Wilson [president] does not want a Union in this plant * * * and I will fight the Union in every legal way possible. * * * If a Union wins all it wins is the right to bargain — nothing more * * *
>
> "Do you realize that the only way a union can try to force your Company to do anything that it is unwilling to do would be to pull you out on strike. If the Union calls an economic strike you place your job on the line. You can be permanently replaced. You can lose your job.
>
> "An economic strike could cause us to lose business. This might cause us to have to shut down the plant. If so, you would be without a job. * * *
>
> "This Union is going to find me to be the most disagreeable person it ever ran up against. I told you last week I was going to fight this Union in every legal way possible, and I mean it. * * *

"In dealing with the Union *I'll deal hard with it— I'll deal cold with it — I'll deal at arm's length with it.*

"You know, or if you don't you should know before you vote that I am not obligated by law to agree to any proposals the Union makes on wages, hours, working conditions, or what have you. *If the Union wins the election we will be obliged to negotiate with it, but we are not obligated to agree to any proposals or request that it makes. We are not required to make any concession to it.*" (emphasis supplied) (355 F 2d at 429).

There can be no question that if the foregoing remarks are entitled to the protection of Section 8(c), Hennemuth's much more temperate explanation of collective bargaining is also entitled to such protection.

In *Belknap Hardware and Manufacturing Co.*, 157 NLRB 1393 (1966) the Board itself has approved the following much more questionable explanation of collective bargaining as privileged within Section 8(c):

" . . . *no union can guarantee you a job. No union can guarantee you steady work. No union can guarantee you an increase in wages. No union can guarantee you more benefits than you now have.* You have absolutely no guarantee or assurance whatsoever that the Teamsters Union can make good on one single promise they have made you, or that they can do one single thing for you." * * *

"The only thing the Teamsters Union can really guarantee you is *trouble* and that they will be around on pay day to get their hands in your pockets and in your paychecks. Unions cannot exist without trouble and they cannot exist without the money they collect in the form of dues, initiation fees, fines and assessments." . . .

"Not only will there by no automatic wage increases or other benefits if the Union wins the election, but just exactly the opposite is true." . . .

"Voting for a union does not automatically bring any increases or any benefits or any job security

to you. If this Union were to win the election tomorrow there would still be only one way that it could try to force us to agree to any of its demands which we thought were unreasonable or which we otherwise couldn't see our way clear to agree to. *That would be by pulling you out on strike!* Now without intending to seem abrupt, I hope you will realize and understand — while there is yet time — that Belknap has no intention of yielding to any such pressure as that — *ever.*"

"[The Union organizer] says that if the Teamsters Union wins the election they will attempt to negotiate with Belknap the Teamsters pension plan'. If the Union organizer thinks for one moment Belknap would agree to seeing the pension plan we now have and to which we have already contributed several million dollars go down the drain, he is badly mistaken and even more stupid than we think he is."

(Emphasis supplied) (157 NLRB at 1396-1399).

Moreover, in *Trent Tube Co.,* 147 NLRB 538 (1964), the Board concluded that a statement that "present benefits would not necessarily continue under a union contract and that bargaining starts from scratch" was legitimate campaign propoganda and merely "partisan electioneering", falling short of objectionable conduct, let alone a violation of 8(a)(1) of the Act; see also *Crane Co.,* 145 NLRB 587 (1963); *George Groh and Sons,* 145 NLRB 775 (1963).

If the Board's position is sustained in this case, the effect would be to prohibit employers from pointing out to employees the adverse consequences of union representation. Such a ruling entirely ignores decisions of the Courts of Appeals holding that such statements are protected by Section 8(c). *NLRB v. Golub Corporation,* 388 F 2d 921 (CA 2, 1967); *NLRB v. TRW-Semiconductors, Inc.,* 385 F 2d 753 (CA 9, 1967); *Southwire Company v. NLRB,* 383 F 2d 235 (CA 5, 1967); *NLRB v. River Togs, Inc.,* 382 F 2d 198 (CA 2, 1967); *NLRB v. Morris Novelty Co. Inc.,* 378 F 2d 1000 (CA 8, 1967);

Caribe General Electric, Inc. v. *NLRB* 357 F 2d 664 (CA 1, 1966); *Texas Industries, Inc.* v. *NLRB,* 336 F 2d 128 (CA 5, 1964); *Union Carbide Corporation* v. *NLRB,* 310 F 2d 844 (CA 6, 1962).

In addition to the explanation of collective bargaining, the Trial Examiner based his finding that the Hennemuth speeches indicated an anticipatory refusal to bargain and, consequently, a threat of reprisal, upon statements to the effect that Raytheon, on the basis of a comparison with other national electronics companies, had a good series of benefits, which Hennemuth was satisfied would not have been any better even if the employees had had a union, and which in the future would not be any better just because a union was on the premises. This finding again reflects the Trial Examiner's failure to distinguish between a prediction and a threat that retaliatory measures will be taken if a union is selected. *Belknap Hardware & Manufacturing Co.,* 157 NLRB 1393 (1966).

In *NLRB* v. *Laars Engineers, Inc.,* 332 F 2d 664 (CA 9, 1964), this Court held that the following statement relating to an employer's level of benefits was protected by Section 8(c) and did not justify the "narrow and strained" construction given to it by the Board:

> "Is it worth letting yourself be talked into the possible loss of your job and the sure loss of a pleasant place to work when you are already getting much more than this same union has gotten for its members in this industry, *and you are already getting all the wages and benefits we can possibly pay?* Just look at the record and you will see that a 'yes' vote is a vote for a union which has obtained. . .
>
> lower wages
> fewer benefits
> more union dues
> more union assessments
> possible strikes

A 'NO' vote is a vote for . . .

higher wages
more benefits
no dues
no assessments
no strikes

Only *you* can decide." (332 F 2d at 666) (emphasis supplied).

The Trial Examiner and the Board in its brief both made particular reference to the statements by Hennemuth regarding sick leave. As noted in the Statement, Hennemuth carefully explained the economic reasons why Raytheon was not in a position to grant sick leave at this time. The Trial Examiner and the Board failed to accord proper weight to this explanation. Since the sole reason sick leave could not be granted was explicitly stated as being Raytheon's uniform fringe benefit policy and the cost involved, there is no basis for the inference that sick leave would not be granted as retaliation for selection of a union as collective bargaining representative. Under these circumstances the sick leave statements are privileged under Section 8(c). *NLRB* v. *Herman Wilson Lumber Company,* 355 F 2d 426 (CA 8, 1966). Indeed, it would have been misleading for Raytheon to have indicated by its failure to respond to union campaign emphasis on the sick leave issue that employees would automatically receive this benefit if the union were selected.

As noted in the Statement, the Board found contrary to the Trial Examiner, that the announcement of "new grievance procedures" constituted a further violation of Section 8(a)(1). The Board's reversal of the Trial Examiner again reflects the narrow, mechanical approach the Board adopted in determining whether the Hennemuth speeches were protected by Section 8(c). During the course of the speeches, Hennemuth informed the employees that one of his functions is to investigate com-

plaints by Raytheon employees at all of the Company's locations to make certain that local management was acting equitably in employee relations matters. These statements, however, did not change the existing procedure, because as the Trial Examiner recognized, all Raytheon employees had the right to present grievances or complaints to Hennemuth. If, as the Board apparently concluded, this right to "appeal" to Hennemuth was presented to influence votes, it undoubtedly would have been included in the prepared portion of the speech to the first group. It is apparent that the subject arose only because questions relating to the grievance procedure indicated to Hennemuth that the questioner might not be aware that employees at Mountain View had the same right as any other Raytheon employee to write Hennemuth's office directly regarding a complaint or grievance.

In sum, the conclusion of the Trial Examiner and the Board that Hennemuth's moderate and reasoned presentation of facts the employees could properly consider prior to the election was not protected by Section 8(c) and the First Amendment, and consequently constituted a violation of Section 8(a)(1), is not supported by substantial evidence and is contrary to established precedent.

B. The Findings of the Trial Examiner and the Board that Raytheon Violated Section 8(a)(1) through Statements made by Supervisor Krest to Employee Alvarado are not Supported by Substantial Evidence and are Erroneous and Incorrect as a Matter of Law.

As noted in the Statement, the emphasis given by the Trial Examiner to the effect that Respondent's violation of Section 8(a)(1) was in "major part" though the Hennemuth speeches raises considerable doubt as to whether the Trial Examiner and the Board would have

concluded that the statements by Krest to Alvarado, standing alone, were a sufficient basis for a finding of a violation of Section 8(a)(1) by Respondent. In any event a review of the Trial Examiner's findings, adopted by the Board, with respect to the Krest statements demonstrates that such statements do not constitute a sufficient basis to support the finding of a Section 8(a)(1) violation.

The respective testimony of Krest and Alvarado was summarized by the Trial Examiner as follows:

Krest . . . testified . . . that on the occasion of the first conversation he called Alvarado to his desk with respect to her requested transfer out of his department, and that Alvarado initiated the topic of unions by saying that if the employees had a union "things like this [the refusal of a transfer] wouldn't happen." Krest testified, "From that point on, we discussed several things about the union," and, in amplification, mentioned the topics of seniority and work standards. On the latter he testified, "I said that I am quite sure that if a union did come into the plant that the union, if they weren't satisfied with the standards which we had on the jobs, would bring in their own industrial engineers. I felt that if they found that our standard was extremely low, they would raise it, you know, if they thought it was completely out of the picture." Krest did not recall if the union was discussed in his second conversation with Alvarado which was concerned primarily, as was the first, with her request for a transfer. (R. 20).

Alvarado testified that:

Krest asked Alvarado why she wanted a union, she replied that she thought a union could provide employees with a better vacation and sick leave plan and higher wages, Krest replied that it would be impossible for the employees to achieve such additional benefits, that he had

not complained to the employees on their work standards, but with a union certain work standards would be set and any employee not meeting them could be discharged; that if the Union was voted in, any employee who was late to work on more than three occasions would be discharged. On the second occasion Krest asked Alvarado if she had attended an IBEW meeting and if so, why. (R. 19-20).

The Trial Examiner failed to make credibility findings to resolve the conflict in testimony between Krest and Alvarado and gave no reasons for crediting the testimony of Alvarado as against that of Krest, instead he made the following ambiguous and conclusory finding:

> "I find, in sum, that Foreman Krest questioned Alvarado concerning her union activities, interrogated her concerning her desire for union prepresentation, and stated, in substance and effect, that she stood to lose rather than gain through union representation in the matter of work standards, and would be unable to obtain the benefits she sought." (R 20)

Even if the Trial Examiner had credited Alvarado's testimony and given reasons therefor, the evidence would not support the finding of a violation of Section 8 (a)(1). It is well established that the alleged interrogation as to why Alvarado wanted a union or why she had attended an IBEW meeting in view of the fact that she had consistently worn an IUE badge for more than two months, standing alone, is not unlawful. *Salinas Valley Broadcasting Corporation v. NLRB* 334 F 2d 604 (CA 9, 1964); *S. H. Kress & Co. v. NLRB* 317 F 2d 225 (CA 9, 1963); *NLRB* v. *Southern California Associated Newspapers,* 299 F 2d 677, 679-680 (CA 9, 1962); *NLRB* v. *Associated Dry Goods Corp.,* 209 F 2d 593 (CA 2, 1954). In *Salinas Valley Broadcasting Corporation v. NLRB, supra,* this Court expressed the rule as follows:

> [2] The mere act of questioning employees concerning union membership is not unlawful in itself. S. H. Kress & Co. v. N.L.R.B. 9 Cir. 1963, 317 F 2d 225. We know of no statute or rule of law that prevents an employer from properly "ascertaining" whom among its employees are seeking to unionize the business. The test is whether what is done by the interrogation interferes with the employee's protected rights. It is the method used; the circumstances existing at the time; and what the employer thereafter does, that is material to proof of illegal action. Management is not interdicted from "ascertaining" which employees want a union. The charges management must answer are whether: (1) it interfered with, restrained or coerced employees (§ 8(a) (1)); (2) it discriminated in regard to tenure of employment (§ 8(a) (3)). (334 F 2d at 607).

The non-coercive nature of Krest's alleged interrogation of Alvarado is apparent. Alvarado had publicly displayed her IUE organizing badge for more than two months and was obviously an open and enthusiastic supporter of the union.

Moreover, on the basis of this Court's decision in the *Salinas* case, Krest's alleged statements that it would be impossible for employees to achieve the benefits which Alvarado sought and that work standards would be set and discipline imposed for violation of said standards, does not constitute a violation of Section 8(a)(1). In that case, the president of respondent company told an employee that if he had a "union [the employees] would lose out on some benefits." 334 F 2d at 608. This Court had the following to say about this remark:

> "The second can be characterized under case law as a threat of economic reprisal against an employee. Cf. National Labor Relations Board v. Elias Brothers Big Boy, Inc. 6 Cir. 1963, 325 F. 2d 360, 365. However, we must remember the employer's right of free speech is still protected under the Act. 29 U.S.C. § 158(c). National Labor Relations Board v. Cosco Products, 5 Cir. 1960 F. 2d 905, 908." . . . (334 F 2d at 608).

> "An unlawful intent is not lightly to be inferred. It cannot rest on remote or speculative evidence. National Labor Relations Board v. Citizen-News, 9 Cir. 1943, 134 F 2d 970. It should not rest upon an inference which itself rests on an inference." . . .
>
> "Neither mere inquiry by employer of employees, without harassment or undue frequency, as to the fact of the existence of a plan to unionize, nor a single somewhat vague prediction of anticipated loss of economic benefits can be transformed or transmuted by the magic or semantic labels into "repeated interrogations" or "threats of economic reprisals," sufficient to swing the balance against the other facts in the record." (334 F 2d 614).

Viewed in the context in which they were made, Krest's alleged statements were merely expressions of personal opinion made by one supervisor to one employee and as such were insufficient to support a finding of violation of Section 8(a)(1). *NLRB* v. *Mallory Plastics Company,* 355 F 2d 509 (CA 7, 1966); *J. S. Dillon & Sons Stores Co.* v. *NLRB,* 338 F 2d 395 (CA 10, 1964); *NLRB* v. *Crosby Chemicals, Inc.,* 274 F 2d 72 (CA 5, 1960); *NLRB* v. *Plankinton Packing Company,* 265 F 2d 638 (CA 7, 1959); *NLRB* v. *Houston Chronicle Pub. Co.* 211 F 2d 848 (CA 5, 1954); *NLRB* v. *Associated Dry Goods Corp.,* 209 F 2d 593, (CA 2, 1954).

Krest as a first level supervisor was in no position to place into effect more stringent work rules in reprisal for selection by the employees of a union as their collective bargaining representative, particularly in view of the statements in Hennemuth's speeches that the Company could not and would not make promises or threats of reprisal to influence the employee's position with respect to union representation. Any remarks made by Krest to Alvarado on this issue can only be regarded as participation in a typical exchange of opposing viewpoints on a subject of interest.

Finally, it must be emphasized that this one isolated incident involving a minor supervisor is insufficient to demonstrate that the Company was enforcing a plan of coercion and therefore must be regarded as *de minimis. NLRB* v. *Dale Industries, Inc.,* 355 F 2d 851 (CA 6, 1966); *Union Carbide Corporation* v. *NLRB,* 310 F 2d 844 (CA 6, 1962); *NLRB* v. *Grunwald-Marx, Inc.,* 290 F 2d 210 (CA 9, 1961); *NLRB* v. *Mississippi Products, Inc.,* 213 F 2d 670 (CA 5, 1954); *NLRB v. Cleveland Trust Co.,* 214 F 2d 95 (CA 6, 1954). The Board itself has recognized the minimal effect of isolated coercive statements by supervisors. In *Morganton Full Fashioned Hosiery Co.,* 107 NLRB 1534 (1954) the Board held that coercive statements by two supervisors were insufficient to warrant setting aside an election, even though the standard in evaluating conduct for purposes of setting aside elections is considerably more stringent than that applied in determining whether conduct constitutes an unfair labor practice. In *Morganton Full Fashioned Hosiery Co., supra,* the Board stated as follows:

> "Lastly, the hearing officer found that prior to the election, two supervisors made coercive statements, each to one employee, to the effect that the plant could close down in the event of a Union victory in the election, and that those statements interfered with the holding of a free election. We do not disagree with the facts found by the hearing officer, as distinguished from his conclusion of interference. We believe, however, that these two coercive remarks are too isolated in nature to constitute substantial interference and thus warrant setting aside an election involving some 639 employees. While the Board has frequently referred to its elections as conducted in a 'laboratory atmosphere,' the adoption of a laboratory standard should not be construed to mean that the Board will ignore the realities of industrial life. In this respect, we are not unmindful of the fact that the 'laboratory' for election purposes is usually an industrial plant where vigorous campaigning and discussion normally take place, and where isolated deviations from the above-mentioned stand-

ard will sometimes arise, notwithstanding the best directed efforts to prevent their occurrence. In view thereof, we are of the opinion that an employee mandate can not lightly be set aside merely because the normal and expected plant discussion happens to include a few isolated threats by overzealous supervisory personnel." (107 NLRB at 1537, 1538).

See *Goodyear Clearwater Mill No. 2*, 109 NLRB 1017 (1954).

The Trial Examiner and the Board failed to give any weight to the absence of even allegations in the complaint that any of the other supervisors or management representatives at the plant had made coercive statements. To ignore such facts "is to ignore the mandate of the two statutes [Administrative Procedure Act and National Labor Relations Act] that decision shall be based upon the record considered as a whole." *Pittsburgh S.S. Co. v. NLRB,* 180 F 2d 731, 742 (CA 6, 1950), aff'd 340 US 498 (1951).

In sum, this Court should conclude that the findings of the Trial Examiner and the Board that Krest's alleged statements to Alvarado violated Section 8(a)(1) of the Act are not supported by substantial evidence and are erroneous and incorrect as a matter of law.

CONCLUSION

On the basis of the foregoing, we respectfully submit that the Board's petition for enforcement in No. 22, 572 should be denied in its entirety.

Alfred C. Phillips

Paul B. Ascher
Attorneys for Raytheon Company

September, 1968

APPENDIX

Section 8(a)(1) of the National Labor Relations Act provides as follows:

> Section 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain or coerce employees in the exercise of their rights quaranteed in Section 7.

Section 7 provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 10(e) of the National Labor Relations Act (29 USC 110(e)) provides in relevant part as follows:

> . . ."The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Section 6 of the Administrative Procedure Act (5 USC 1009(e)) provides as follows:

Section 1009(e). Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. It shall—

> (A) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (B) hold unlawful and set aside agency action, findings, and conclusions found to be—

Appendix (Continued)

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) contrary to constitutional right, power, privilege, or immunity;

(3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(4) without observance of procedure required by law;

(5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with these rules.

Alfred C. Phillips

ALFRED C. PHILLIPS